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No. 93-258

In The

Supreme Court of the United States

October Term, 1993

DR. PATRICIA SCHLOESSER,

Petitioner,

v.

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and DR. STANLEY C. GRANT

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY REVIEW AND REVERSE THE DISTRICT COURT.

II. DOES CONFLICTING LAW AMONG THE CIRCUITS EXIST ON THE LAW CONCERNING FEDERAL LIMITATIONS PERIOD IN DETERMINING WHETHER AN EMPLOYEE MAY ASSERT EQUITABLE MODIFICATION WHEN AN EMPLOYEE'S CLAIM IS TIME-BARRED PURSUANT TO 29 U.S.C. § 626(d).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF CASE

Respondents' disagree with petitioner's characterization of this case. Petitioners took the case to trial on three theories: (1) respondent discriminated against her on the basis of age in demoting petitioner; (2) respondent discriminated against petitioner on the basis of age by firing her and; (3) respondent retaliated against petitioner for raising the issue of age discrimination at her May 2, 1988, demotion meeting. In motions for summary judgment, directed verdict and judgment notwithstanding the verdict, respondent argued that petitioner's demotion claim was time-barred because the administrative complaint was filed well beyond

the statutory 300-day period. At trial the jury found for petitioner on her demotion claim and for respondent on the retaliation, willfulness and discriminatory claims.

The trial court, at each stage, found petitioner was entitled to an equitable tolling of the time period because the Secretary of KDHE, Dr. Stanley C. Grant, made alleged misrepresentations "with respect to her subsequent job." Tr.app. at 276-277. The Tenth Circuit found that petitioner had ample notice on May 2, 1988, to believe her demotion was the result of age discrimination. At the summary judgment phase and at trial petitioner presented evidence that Dr. Grant advised her in April, 1988, that he was unhappy with her work and gave his reasons for her demotion. Tr.app. at 64, 82, 208-210. On May 2, 1988, petitioner's attorney warned Dr. Grant that he could not base petitioner's proposed demotion on discrimination. App. at 82-83. Dr. Grant subsequently made a series of comments which petitioner and her attorney believed proved respondent had age-bias at the time of the May 2, 1988 meeting. App. at 83-84; Tr.App. at 211, 213. On May 2, 1988, petitioner and her attorney both knew she had been demoted. App. at 64-65; Tr.app. at 202-203, 213. Plaintiff did not file her EEOC complaint until June 19, 1989. App. at 67.

Petitioner was terminated for lawful reasons on May 9, 1989. Verdict, #3. At trial, she testified that all the bases for believing she was the victim of age discrimination occurred prior to May 2, 1988. App. at 90-91; Tr.App. at 214-215. At trial, petitioner unsuccessfully tried to prove that her termination was age-related based on promises Dr. Grant made on May 2, 1988, about her subsequent job. App. at 92-93; Tr.App. at 223-224. Petitioner unsuccessfully argued to the Tenth Circuit that these May 2, 1988, statements about her future position, to which she was demoted, tolled the time for filing her complaint about her demotion. The circuit disagreed.

REASONS CERTIORARI SHOULD BE DENIED

I. The United States Court of Appeals for the Tenth Circuit Properly Reviewed and Reversed the District Court.

A. Petitioner's Argument is raised for the First Time.

Nowhere in Petitioner's brief to the Tenth Circuit, or previously, did she argue the line of cases cited on pages 7-10 of her Petition for Writ of Certiorari to this Court ("Petition"). Nowhere in Petitioner's brief or oral argument to the Tenth Circuit did she argue that the ruling on summary judgment was "interlocutory," "strictly a pretrial order," or "limited and incomplete." Neither respondents nor the Tenth Circuit has seen these cases or this reasoning previously. Based upon longstanding precedent, this Court should deny the petition on this reason alone. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38, 109 S.Ct. 2782, 2788, 106 L.Ed.2d 26 (1989); *Sozinsky v. U.S.*, 300 U.S. 506, 514, 57 S.Ct. 554, 556, 81 L.Ed. 772 (1937). In fact, if petitioner had raised this argument before the lower court, assuming the reasoning has merit, the Tenth Circuit could have easily overcome such law by reversing the district courts' ruling on respondent's motions for directed verdict or judgment notwithstanding the verdict. (Now, Fed.R.Civ.P. 50, Judgment as a Matter of Law ["JAMOL"]). See below, § IB. Petitioner's belated argument illustrates the reason for the *Nordberg* rule: the lower court could have easily corrected any procedural infirmities in its decision; petitioner cannot resurrect her failed claim by asserting a new theory.

B. The 10th Circuit Ruling is proper on other grounds.

A second fatal failing in petitioner's arguments is that the Tenth's Circuit's decision can be upheld where there are other grounds upon which the court could have ruled in respondent's favor. A prevailing party "may, of course,

defend its judgment on any grounds properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or even the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n. 20, 99 S.Ct. 740, 749, n. 20, 58 L.Ed.2d 740 (1979). Respondents had also asked the Tenth Circuit to reverse the district court's rulings on its motions for directed verdict and judgment not withstanding the verdict (j.n.o.v.). Respondents' arguments and proof under summary judgment, directed verdict and j.n.o.v. are almost identical. In fact, as petitioner recognizes, the Tenth Circuit relied in part, in its decision, on facts that were presented at trial, rather than in summary judgment briefs. *See* Petition, at 13-14. However, the Tenth Circuit's reasoning and grounds for its ruling are still, simply, that petitioner knew of her demotion on May 2, 1988, knew of the consequences of her demotion on or shortly after May 2, 1988, and had a firm belief of age-bias on May 2, 1988. The three-hundred day time period began to run.

Petitioner's newly raised cases include *Whalen v. Unit Rig. Inc.*, 974 F.2d 1248 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1417, 122 L.Ed.2d 787 (1993), in which the court states:

> We now hold that even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law ("JAMOL") and appellate review of those motions if they were denied. 974 F.2d at 1251.

Respondent duly raised the timeliness issue in its Rule 50 JAMOL motions, relied on the same facts and caselaw as in its motion for summary judgment, and sustained unfavorable rulings from the district court on the same basis. At each stage the district court agreed with petitioner that statements made about a subsequent job can toll time deadlines for a recognized demotion. The Tenth Circuit disagreed with this reasoning and these rulings. The ve-

hicle the circuit chose for reversing the case was the summary judgment order. The Court could have reversed either the order on directed verdict or j.n.o.v. and reached the same point, that is, petitioner's demotion claim was untimely as a matter of law. *Washington*, 439 U.S. at 476, n. 20.

C. The Court of Appeals Used the Correct Standard of Review.

1. The Court of Appeals did not Substitute Itself for the Trier of Fact.

Petitioner claims a material factual dispute exists as to whether her new job was "important" and whether Dr. Grant had "discriminatory intent when he demoted her." The Tenth Circuit found, as a matter of law, neither of these facts is relevant to equitable tolling or estoppel. Whether petitioner's job following her demotion was important, had clerical support, a large office, or adequate responsibilities are not factors which can toll the demotion time limits. The Tenth Circuit looked at petitioner's own testimony and her admitted knowledge as of May 2, 1988. Petitioner and her attorney undeniably knew she was demoted and believed the demotion decision was age-based. An adverse employment action taken for allegedly discriminatory reasons triggers the ADEA time periods. *Delaware State College v. Ricks*, 449 U.S. 250, 258, 66 L.Ed.2d 431, 439, 101 S.Ct. 498 [1980]. Respondent's ultimate "intent" or the true "importance" of plaintiff's new job are evidence of other issues (e.g. retaliation, discrimination in termination), not evidence of equitable tolling or estoppel. The court used the correct legal standards.

2. The Court of Appeals Correctly Applied the Facts.

It is undisputed petitioner was demoted on May 2, 1988, and she knew it. The Circuit recognized additional facts, adduced at trial, by which petitioner suffered the further

consequences of her demotion - e.g. reduced pay, less office space, diminished clerical support. The court stated petitioner suffered these consequences "immediately" and petitioner argues that some conditions of her new job were not realized for three to five months. Again, such facts are irrelevant to the applicable law and the court's decision remains well-founded. *Ricks*, 449 U.S. at 258. The terms and conditions of her new job, however or how quickly they deteriorated, did not change the fact of petitioner's demotion, her knowledge of the demotion and her belief that discrimination occurred. Even if the court used the term "immediately" for an event that occurred in October or even if the court cited a fact developed at trial, the court's conclusion remains the same. *Washington*, 439 U.S. at 476, note 20.

D. Conclusion.

Petitioner raises caselaw and arguments for the first time in her Petition. She also ignores long-held law that a decision stands when it is founded on issues previously raised, even if the court of appeals decided the case on different grounds. No factual or procedural error by the Tenth Circuit, even assuming any exists, alters the decision. Petitioner's demotion claim was time-barred for failure to file a timely EEOC complaint, even after she suffered a demotion which she believed to be discriminatory. This Court has no reason to review or reverse the Tenth Circuit Court of Appeals.

II. No Conflicting Law Among the Circuits Exists on the Law Concerning Federal Limitations Periods in Determining Whether an Employee may Assert Equitable Modification when an Employee's Claim is Time-Barred Pursuant to 29 U.S.C. § 626(d).

Any confusion which petitioner creates on the equitable modification issue can be explained in one of two ways:

(1) Caselaw Terminology - most courts articulate the two doctrines of equitable tolling and equitable estoppel, however, *all* courts apply similar principles regardless of what nomenclature is used; (2) Petitioner's Terminology - Petitioner has, throughout this case, confused the two terms, which was recognized by the Tenth Circuit in its discussion of equitable tolling and estoppel. Tenth Circuit Order and Judgment ("Order") fn 1. Any such confusing distinctions by petitioner are irrelevant to the court's substantive ruling.

A. The Tenth Circuit Followed Existing Precedent.

The United States Supreme Court has admonished that procedural requirements for gaining access to courts should be strictly adhered to and not disregarded out of a "vague sympathy for a particular litigant." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 80 L.Ed.2d 196, 202, 104 S.Ct. 1723 (1984). More recently the Court reasserted, "[F]ederal courts have typically extended equitable relief only sparingly." *Irwin v. Veterans Admin.*, U.S. , 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990). The Court in *Irwin* defined the parameters of equitable tolling as follows:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. (citations omitted) 111 S.Ct. at 460.

In discrimination actions this Court has held the applicable statute of limitations period accrues when the adverse employment decision is made and communicated to the employee (*Delaware State College v. Ricks*, 449 U.S. 250, 258, 66 L.Ed.2d 431, 439, 101 S.Ct. 498 [1980]), regardless of

when the ultimate consequences of the decision are felt. *Id.*

Petitioner urges this court to grant certiorari on the basis that the Tenth Circuit analysis erroneously employed equitable tolling principles, rather than equitable estoppel. Once again, petitioner is raising an issue for the first time in her Petition to the Court. *Sozinsky,* 300 U.S. at 514. In all previous responses, briefs and arguments petitioner has urged the courts to "toll" the statute of limitations period because Dr. Grant misstated the contours of her new job. *See,* "Order," fn 1. The circuit court rejected petitioner's tolling argument, as well as any estoppel bases for her claim. *Id.* Startlingly, petitioner argues that under the Tenth Circuit's analysis employees would no longer be able to rely on an employer's statement that, its actions are not discriminatory. Petition, p. 19. This is an irrelevant assertion. "No employer is likely to admit . . . a flagrant violation of a federal law against discrimination . . . *Heideman v. PFL, Inc.,* 904 F.2d 1262, 1266 (8th Cir. 1990). Petitioner also criticizes the Tenth Circuit order because, now, "any type of job change which could be construed as a 'demotion' or lesser job . . . would set in motion the [ADEA] time clock." Petition, p. 19. This is rightly so under *Ricks* and all limitations principles.

The Tenth Circuit recognized that petitioner undisputably had all the elements necessary to timely file her EEOC complaint on or shortly after May 2, 1988. Dr. Grant made no promises about restoring petitioner to her past status or about settlement negotiations, so petitioner was not estopped from asserting the timeliness issue. Statements about petitioner's new position involved a separate job action—i.e. the eventual elimination of her job. Under these circumstances, and under either equitable theory, petitioner was not entitled to sit on her claim until some unidentified future point in time, then assert that time deadlines do not apply to her.

B. The Previous Tenth Circuit Standard

All previous Tenth Circuit equitable tolling cases involved actively misleading statements about plaintiff's procedural rights. *Scheerer v. Rose State College,* 950 F.2d 661, 665 (10th Cir. 1991) *cert. denied* 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992). One Tenth Circuit case examined fraudulent concealment by the employer and found, even if federal law applies (rather than state law), the employer's bad acts must result in the employee's ignorance of his claim. *Pike v. City of Mission, Kan,* 731 F.2d 655, 659 (10th Cir. 1984). This reasoning is consistent with the circuit's analysis of petitioner's arguments.

In the present case the Tenth Circuit expanded its previous holdings and applied equitable estoppel, as well as equitable tolling when the employer allegedly made misrepresentations about nonprocedural matters. The court also adhered to the warnings issued in *Baldwin County;* had the Tenth Circuit adopted petitioner's equitable relief notions, no certainty would any longer attach to time deadlines. As long as one subsequent promise remained unmet, employers would risk being sued long past their known adverse job decisions. Here, the Tenth Circuit followed equity principles and expanded its own guidelines in examining petitioner's claims.

C. Decisions in other Circuits.

No split among the circuits exists as to the substantive law on equitable modification. Moreover, equitable tolling has been defined, once again, by this court in the *Irwin* case. All courts recognize that where an employer misleads an employee as to whether she has a cause of action under the ADEA, time deadlines can be waived. No court in any circuit has held, however, that the statute of limitations can be tolled or the employer estopped from asserting it as a defense where, as here, the employee knew a discrete, adverse action had taken place, heard various age-based

statements during her demotion meeting and hired an attorney to protect her rights under the ADEA and Title VII. At that point the time deadlines accrued. *See Olson v. Mobile Oil Corp.*, 904 F.2d 198, (4th Cir. 1990) (Plaintiff's argument that defendant concealed operative facts is "undercut" by his awareness of his cause of action and "it hardly seems equitable to toll a limitations period when the employee concededly possessed the information necessary to file a timely discrimination charge." *Id.* at 201); *Mull v. Arco Durethene Plastics, Inc.*, 784 F.2d 284, (7th Cir. 1986) (Employee's knowledge of adverse employment decision ". . . made his reliance on defendants' alleged misleading actions an impossibility. Equitable estoppel is, therefore, unwarranted, here." *Id.* at 292).

Petitioner cites the Seventh Circuit case of *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) to define her newly-asserted equitable estoppel/fraudulent concealment argument and to create a "split" in the circuits. *Cada* offers her no relief on either front. *Cada's* fraudulent concealment concept provides relief until plaintiff discovers - or should have discovered - her injury. *Id.* at 451. Certainly, Petitioner knew on May 2, 1988, she was injured. The *Cada* court cites *Carbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45 (2nd Cir. 1985) to illustrate a possible error in reasoning by the Second Circuit. The *Carbone* court appears to require employer action to invoke equitable tolling. However, the *Irwin* case has redefined equitable tolling and thereby clarified the parameters of the doctrine. Although not relevant to the *Carbone* holding or to the present case, after *Irwin* it is clear equitable tolling may be invoked regardless of employer conduct. The Second Circuit must now follow *Irwin*; any discrepancy between the circuits is, therefore, moot. The Tenth Circuit assumed Dr. Grant may have misstated petitioner's new position, and petitioner now urges equitable estoppel, not tolling, be applied to

her circumstances. The *Carbone* holding is not even applicable to these facts.

The Fifth Circuit in *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642 (5th Cir. 1988), the case which the Tenth Circuit cites and follows, recognizes both equitable doctrines and follows the *Irwin* case. *Id.* at 645. The *Blumberg* court rejects estoppel where plaintiff could and did evaluate the propriety of the reasons for her termination; again, the employer cannot mislead an employee by denying he had discriminatory intent. Knowledge of her claim at the time of discharge is the key factor under either doctrine. *Id.* at 645. The Tenth Circuit thereby followed the Supreme Court and all relevant precedent from other circuits in its order.

CONCLUSION

Based upon undisputed facts, the Tenth Circuit found that petitioner had all the information she needed to file her claim on May 2, 1988, or within the 300 days thereafter. Discussions about the conditions of her subsequent job did not toll the statutory time period. The circuit followed *Irwin* and all existing precedent to reach its conclusion. There is no split among the circuits under these facts; the case plaintiff cites to create a circuit split has been subsequently overruled, in part, by *Irwin*. Petitioner is not entitled to equity under either doctrine where she failed to "exercise due diligence in preserving her legal rights." *Irwin*, 111 S.Ct. at 460.

Respectfully submitted,

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